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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

JOHN RAYMOND et al., Plaintiffs and Respondents, v. HARRY B. KRAM, Defendant and Appellant.	B236552 (Los Angeles County Super. Ct. No. BC452447)

APPEAL from an order of the Superior Court of Los Angeles County, Teresa Sanchez-Gordon, Judge. Reversed.

La Follette, Johnson, De Haas, Fesler & Ames, Louis H. De Haas, Mark B. Guterman; Schmid & Voiles, Denise H. Greer and Kathleen D. McColgan for Defendant and Appellant.

Donald A. Garrard; Eric S. Multhaup for Plaintiffs and Respondents.

INTRODUCTION

Defendant Harry Kram, M.D., appeals an order denying his petition to compel arbitration pursuant to an arbitration agreement signed by Dr. Kram's patient, plaintiff John Raymond. We find that the arbitration agreement was not substantively unconscionable because of its provision requiring Raymond to pay the fees of his arbitrator and half the fees of the neutral arbitrator. The lack of substantive unconscionability requires reversal of the order denying defendant's petition to compel arbitration.

FACTUAL AND PROCEDURAL HISTORY

On September 8, 2009, Riad Adoumie, M.D. advised plaintiff John Raymond that he needed endarterectomy surgery for his left carotid artery the following week. Dr. Adoumie, however, was not an approved provider for CIGNA, Raymond's health insurer. Raymond contacted several vascular surgeons on CIGNA's approved list, but all had opted out of CIGNA's preferred provider list. Harry Kram, M.D., was the only vascular surgeon Raymond was able to locate in the South Bay who was on CIGNA's approved provider list. Dr. Kram is a general surgeon licensed to practice medicine in California.

When Raymond arrived at Dr. Kram's office for an appointment on September 14, 2009, the receptionist handed him documents, including a Physician-Patient Arbitration Agreement, which he was asked to sign. The receptionist did not explain the documents, arbitration, or what it might involve, and Raymond was not told that he had any choice to sign or not to sign the documents. The only instruction he received was to fill out the forms. Raymond recalled filling out patient history and emergency contact forms, but had no recollection of reading or signing the Physician-Patient Arbitration Agreement, although he acknowledged that his signature was on that document. Raymond felt he had no option but sign the documents because Dr. Kram was the only vascular surgeon in the South Bay that he was able to find who was a CIGNA preferred provider, and Dr. Adoumie had told Raymond he needed to have an endarterectomy of his left carotid artery immediately.

Article 1 of the arbitration agreement states: "It is understood that any dispute as to medical malpractice, that is as to whether any medical services rendered under this contract were unnecessary or unauthorized or were improperly, negligently, or incompetently, rendered, will be determined by submission to arbitration as provided by California law, and not by a lawsuit or resort to court process except as California law provides for judicial review of arbitration proceedings. Both parties to this contract, by entering into it, are giving up their constitutional rights to have any such dispute decided in a court of law before a jury, and instead are accepting the use of arbitration."

Article 3 of the arbitration agreement states: "A demand for arbitration must be communicated in writing to all parties. Each party shall select an arbitrator (party arbitrator) within thirty days and a third arbitrator (neutral arbitrator) shall be selected by the arbitrators appointed by the parties within thirty days of a demand for a neutral arbitrator by either party. Each party to the arbitration shall pay such party's pro rata share of the expenses and fees of the neutral arbitrator, together with other expenses of the arbitration incurred or approved by the neutral arbitrator, not including counsel fees or witness fees, or other expenses incurred by a party for such party's own benefit." The arbitration agreement does not give the cost of fees and costs for a medical malpractice arbitration, and contains no provision for mitigation of arbitration costs that are unaffordable to a patient.

When Raymond was provided with the Physician-Patient Arbitration Agreement, there was no discussion with anyone about its contents and its significance was not explained. Raymond was never informed what the terms "party arbitrator" or "third party arbitrator" meant and was never advised about potential costs he would have to pay if he pursued a claim in an arbitration proceeding. No one from Dr. Kram's office advised him that he did not have to sign the arbitration agreement, that he could receive medical care from Dr. Kram if he elected not to sign the arbitration agreement, or that the probable cost to him for a "party arbitrator" and his share of the cost of a "neutral arbitrator" would easily exceed $10,000 and that arbitrators in medical malpractice arbitration regularly charged and received fees exceeding $250 an hour. Raymond stated

that if he had been made aware of these facts, he would not have signed the arbitration agreement. Raymond also stated that he had no understanding that by signing the arbitration agreement, he would waive his right to a jury trial in any dispute or claim against Dr. Kram, that any claim against Dr. Kram would have to be pursued in a three-arbitrator arbitration proceeding, or that he would be required to pay the cost of a party arbitrator and half the cost of a neutral arbitrator.

When he signed the arbitration agreement John Raymond was employed with Atlantic Aviation as a quality assurance and safety training manager earning $24.72 an hour. He was the primary wage earner for his family, comprising his wife Sandra Raymond and two teenaged daughters.

Dr. Kram stated that a patient's signing of the arbitration agreement has always been voluntary in his office, and he has never required patients to sign an arbitration agreement in order to receive medical care.

The arbitration agreement does not inform the patient that the agreement is optional, that the patient's signing of the arbitration agreement is voluntary, or that signing the arbitration agreement is not required in order to receive medical care.

Dr. Kram last treated John Raymond in December 2009.

John Raymond and Sandra Raymond sued Harry Kram, M.D. and Los Angeles Doctors Hospital Associates LP (dba Los Angeles Metropolitan Medical Center) for medical negligence. Los Angeles Doctors Hospital Associates LP is not a party to this appeal. The complaint alleged that on October 13, 2010, while a patient at Los Angeles Metropolitan Medical Center, John Raymond suffered a stroke resulting from Kram's negligence in the placement of an arterial stent in Raymond's right carotid artery and in the surgical attempted placement of an arterial stent in Raymond's left carotid artery, causing him to suffer pain, disfigurement, loss of function, paralysis, cognitive injury and mental alteration, and permanent and disabling physical and mental disabilities. The complaint alleged that as a result of these injuries to John Raymond, Sandra Raymond had suffered a loss of consortium.

On June 13, 2011, Dr. Kram filed a petition for an order staying the superior court action between arbitrating parties and requiring plaintiffs to arbitrate the controversy. On August 29, 2011, the trial court denied Kram's petition.

Dr. Kram filed a timely notice of appeal from the order denying his petition to require arbitration, an appealable order (Code Civ. Proc, § 1294, subd. (a)[1]).

ISSUES

Dr. Kram claims on appeal that:

1. The trial court erroneously determined that the arbitration agreement was unconscionable, and the arbitration agreement is neither procedurally nor substantively unconscionable; and

2. The trial court erroneously denied the petition to compel arbitration based on the possibility of conflicting results, because section 1295 arbitration agreements are exempt from that policy.

DISCUSSION

1. *Arbitration: The Law of Unconscionability*

Arbitration agreements rely on the parties' voluntary submission of disputes for resolution in a non-judicial forum. (*Armendariz v. Foundation Health Psychcare Services, Inc*. (2000) 24 Cal.4th 83, 115 (*Armendariz*); *Fitz v. NCR Corp*. (2004) 118 Cal.App.4th 702, 711) "A written agreement to submit to arbitration an existing controversy or a controversy thereafter arising is valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract." (§ 1281; see also § 1281.2, subd. (b).) Unconscionability provides one such ground for invalidating arbitration agreements. (Civ. Code, § 1670.5, subd. (a); *Armendariz,* at pp. 113-114.)

[1] Unless otherwise specified, statutes in this opinion will refer to the Code of Civil Procedure.

The doctrine of unconscionability has both a procedural and a substantive element. The procedural element focuses on "oppression" or "surprise" due to the parties' unequal bargaining power. The substantive element focuses on "overly harsh" or "one-sided" results. (*Little v. Auto Stiegler, Inc*. (2003) 29 Cal.4th 1064, 1071 (*Little*).)

The procedural element of unconscionability generally takes the form of a contract of adhesion (*Little, supra*, 29 Cal.4th at p. 1071). A contract of adhesion signifies a standardized contract, " ' "which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it." ' [Citation.]" (*Ibid*.) Such a contract is procedurally unconscionable because the "inequality of bargaining power of the parties to the contract" creates "an absence of real negotiation or a meaningful choice on the part of the weaker party." (*Kinney v. United Healthcare Services, Inc*. (1999) 70 Cal.App.4th 1322, 1329.)

Substantive unconscionability focuses on whether the terms of the agreement are so one-sided as to "shock the conscience." Mutuality is the paramount consideration in assessing substantive conscionability. Substantive unconscionability can take various forms but can generally be described as unfairly one-sided. (*Nyulassy v. Lockheed Martin Corp*. (2004) 120 Cal.App.4th 1267, 1281; see *Abramson v. Juniper Networks, Inc*. (2004) 115 Cal.App.4th 638, 656-658.)

For a court to exercise its discretion to refuse to enforce an arbitration clause because of its unconscionability, both procedural and substantive unconscionability must be present. Both need not be present in the same degree, however, and a "sliding scale" test applies to their relative importance. Pursuant to this sliding scale test, "the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa." (*Armendariz, supra*, 24 Cal.4th at p. 114.)

The party seeking to compel arbitration bears the burden of proving the existence of a valid arbitration agreement. (*Fagelbaum & Heller LLP v. Smylie* (2009) 174 Cal.App.4th 1351, 1363.)

Whether a contract is unconscionable is a question of law, and where there are no factual disputes the appellate court reviews the issue of unconscionability de novo. (*Lanigan v. City of Los Angeles* (2011) 199 Cal.App.4th 1020, 1035.)

2. *The Arbitration Agreement Was Not Substantively Unconscionable*

Raymond in part argues that the arbitration agreement was procedurally unconscionable as a contract of adhesion. An arbitration agreement that complies with section 1295, however, is subject to a presumption that the arbitration agreement is not a contract of adhesion or procedurally unconscionable. Section 1295, subdivisions (a) and (b) set forth language that must appear in a contract for medical services containing a provision for arbitration of disputes of professional negligence of a health care provider.[2] Section 1295, subdivision (e) states that such a contract "is not a contract of adhesion, nor unconscionable nor otherwise improper, where it complies with subdivisions (a), (b) and

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[2] Section 1295 provides in pertinent part: "(a) Any contract for medical services which contains a provision for arbitration of any dispute as to professional negligence of a health care provider shall have such provision as the first article of the contract and shall be expressed in the following language: 'It is understood that any dispute as to medical malpractice, that is as to whether any medical services rendered under this contract were unnecessary or unauthorized or were improperly, negligently or incompetently rendered, will be determined by submission to arbitration as provided by California law, and not by a lawsuit or resort to court process except as California law provides for judicial review of arbitration proceedings. Both parties to this contract, by entering into it, are giving up their constitutional right to have any such dispute decided in a court of law before a jury, and instead are accepting the use of arbitration.' [¶] (b) Immediately before the signature line provided for the individual contracting for the medical services must appear the following in at least 10–point bold red type: [¶] 'NOTICE: BY SIGNING THIS CONTRACT YOU ARE AGREEING TO HAVE ANY ISSUE OF MEDICAL MALPRACTICE DECIDED BY NEUTRAL ARBITRATION AND YOU ARE GIVING UP YOUR RIGHT TO A JURY OR COURT TRIAL. SEE ARTICLE 1 OF THIS CONTRACT.' [¶] (c) Once signed, such a contract governs all subsequent open-book account transactions for medical services for which the contract was signed until or unless rescinded by written notice within 30 days of signature. Written notice of such rescission may be given by a guardian or conservator of the patient if the patient is incapacitated or a minor. [¶] . . . [¶] (e) Such a contract is not a contract of adhesion, nor unconscionable nor otherwise improper, where it complies with subdivisions (a), (b) and (c) of this section."

(c) of this section." Because we find, *post*, that the arbitration agreement was not substantively unconscionable, we need not further inquire into the applicability of the presumption of section 1295 or the issue of procedural unconscionability.

Unconscionability is determined as of the time the contract is made. (Civ. Code, § 1670.5, subd. (a); *American Software, Inc. v. Ali* (1996) 46 Cal.App.4th 1386, 1391.) Substantive unconscionability make take several forms, but is generally described as unfairly one-sided (*Little, supra*, 29 Cal.4th at p. 1071) so as to shock the conscience or which impose harsh or oppressive terms. (*Wherry v. Award, Inc.* (2011) 192 Cal.App.4th 1242, 1248.) More concretely, substantive unconscionability may arise if contractual provisions reallocate risks in an objectively unreasonable or unexpected manner. (*Roman v. Superior Court* (2009) 172 Cal.App.4th 1462, 1470.)

In the trial court Raymond argued that that the arbitration agreement was substantively unconscionable because it required Raymond to pay the fees of his party arbitrator and half the fees of the neutral arbitrator, and lacked any provision for mitigation of fees to be paid by Raymond. The cost allocation provision of the arbitration agreement, however, quotes Code of Civil Procedure section 1284.2 almost exactly.[3] In addition, in section 1284.2 the Legislature established a policy that arbitration costs are to be paid by the party incurring them unless the parties agree otherwise. (*Lagatree v. Luce, Forward, Hamilton & Scripps* (1999) 74 Cal.App.4th 1105, 1133.) Defendant Kram, moreover, offered to advance Raymond the cost of these fees, with that amount to

[3] Section 1284.2 states: "Unless the arbitration agreement otherwise provides or the parties to the arbitration otherwise agree, each party to the arbitration shall pay his pro rata share of the expenses and fees of the neutral arbitrator, together with other expenses of the arbitration incurred or approved by the neutral arbitrator, not including counsel fees or witness fees or other expenses incurred by a party for his own benefit."

be reimbursed to Kram out of Raymond's recovery.[4] Thus the arbitration agreement was not substantively unconscionable. The lack of any substantive unconscionability means that procedural unconscionability, even if present, is not sufficient to make the arbitration agreement void.

Raymond cites cases finding that arbitration provisions that did not disclose substantial arbitration costs to the weaker party or did not provide relief from unaffordable costs were substantively unconscionable. These cases, however, did not involve medical services contracts providing for arbitration of disputes as to a health care provider's professional negligence. These cases involved consumers or employees seeking to vindicate unwaivable statutory or common law rights who were required to arbitrate by agreements containing one-sided terms. (*Martinez v. Master Protection Corp*. (2004) 118 Cal.App.4th 107, 114-117; *Little, supra*, 29 Cal.4th at pp. 1076-1081; *Gutierrez v. Autowest, Inc*. (2003) 114 Cal.App.4th 77, 86, 94-96, 100-101.) They do not apply to this appeal.

3. *Denial of Petition to Compel Arbitration Because of the Possibility of Conflicting Rulings Was Erroneous*

One ground of the order denying the petition to compel arbitration was the existence of a third party not subject to the arbitration agreement (here, defendant Los Angeles Doctors Hospital Associates LP) and the possibility of conflicting rulings if the action were divided into a proceeding in arbitration and a court proceeding.

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[4] Dr. Kram's offer was that if the trial court approved plaintiffs' "Request to Waive Court Fees," plaintiffs and their counsel would sign a stipulation binding them to repay monies advanced to plaintiffs if plaintiffs recovered money in the arbitration award. The amount of fees to be advanced to plaintiffs was limited to payment of (1) plaintiffs' pro rata share of the neutral arbitrator's fees; (2) other arbitration expenses approved by the neutral arbitrator (which were to exclude counsel fees, witness fees, or other expenses incurred by plaintiffs for their own benefit); and (3) fees of plaintiffs' party arbitrator up to a maximum of the hourly rate charged by Dr. Kram's party arbitrator, as approved by the neutral arbitrator.

Defendant correctly argues that this ground for denying a petition to compel arbitration is subject to an exception in section 1281.2, subdivision (c). Section 1281.2 states that a court shall order the parties to an arbitration agreement to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists, "unless it determines that: [¶] . . . [¶] (c) A party to the arbitration agreement is also a party to a pending court action or special proceeding with a third party, arising out of the same transaction or series of related transactions and there is a possibility of conflicting rulings on a common issue of law or fact. . . . This subdivision shall not be applicable to an agreement to arbitrate disputes as to the professional negligence of a health care provider made pursuant to Section 1295." Thus the exception states that a trial court's authority to decline to compel arbitration does not apply to arbitration agreements made pursuant to section 1295. (*Mercury Ins. Group v. Superior Court* (1998) 19 Cal.4th 332, 343.)

Thus this ground for the denial of the petition to compel arbitration was erroneous.

DISPOSITION

The order denying defendant's petition to compel arbitration is reversed. The parties are ordered to bear their own costs on appeal.

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KITCHING, J.

We concur:

CROSKEY, Acting P. J.

ALDRICH, J.